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IN THE

Supreme Court of the United States

OCTOBER TERM, 1958.

No. [redacted] 17

JOHN PATRICK HENRY,
Petitioner,

vs.

THE UNITED STATES OF AMERICA,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER, JOHN PATRICK HENRY.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1958.

No. 559

JOHN PATRICK HENRY,

Petitioner,

vs.

THE UNITED STATES OF AMERICA,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit.

BRIEF FOR PETITIONER, JOHN PATRICK HENRY.

OPINION OF THE COURT BELOW.

The opinion in the Court of Appeals (R. 80-89) is reported at 259 F.2d 725.

JURISDICTION.

The order of the United States Court of Appeals for the Seventh Circuit, affirming the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, was filed on October 2, 1958. (R. 90). On November 4, 1958, it was ordered that the petition for rehearing be denied. (R. 91) The petition for certiorari was filed within thirty days of the denial of the petition

for rehearing in the United States Court of Appeals for the Seventh Circuit. The jurisdiction of this Court is invoked under 28 U. S. C. 1254(1).

QUESTIONS PRESENTED.

1. Was it not error for the Court of Appeals to sustain the ruling of the District Court, denying the defendant's motion to suppress the evidence, which was secured by agents of the Federal Bureau of Investigation, in violation of the defendant's rights under the Fourth Amendment to the Constitution of the United States?

2. Does the Fourth Amendment to the Constitution of the United States permit the stopping of an individual riding in a motor vehicle on the public highway, detention and questioning of said individual, search of the vehicle in which he is riding as a passenger, physical deprivation of his freedom of movement, without such conduct constituting an arrest? Is the arrest delayed or inchoate until the federal officers choose to inform him that he has been "formally" arrested some three hours after the original detention, where the original stopping of the vehicle and detention of the person was without probable cause for an arrest or search?

(a) Will facts developed by the officers during the detention, and from it, justify this procedure?

3. Where armed agents of the Federal Bureau of Investigation have no warrant of arrest or search warrant, does their act of stopping an automobile, occupied by the driver and the petitioner, a passenger, traveling on a public thoroughfare in Chicago, Illinois, constitute an arrest, where the occupants of said automobile remained in continuous custody of the Federal Bureau of Investigation until their arraignment before the United States Commissioner on the following day?

4. Does such an arrest occur at the moment when the automobile is stopped by the compulsion of the government agents, or was the arrest delayed until following the stopping, when the questions asked of the occupants were not satisfactorily answered?

5. Where the United States Court of Appeals has distorted, by its interpretation of *Brinegar* v. *United States*, 338 U.S. 160 and *Carroll* v. *United States*, 267 U.S. 132, the meaning of these cases in order to sustain a search without warrant, and where no facts exist constituting probable cause to make an arrest, or to obtain a search warrant, should not this Court reverse on the principle that a search in law is good or bad when it starts, and does not change character from its success?

6. Where it appears from the evidence that the defendant, JOHN PATRICK HENRY, was convicted solely on the government's evidence of his presence as a passenger in an automobile, which contained stolen goods discovered after his arrest, and his fleeting twenty minute association with the other defendant, should it not be determined, as a matter of law, that there was insufficient evidence to authorize a conviction in a case where the defendant offered no evidence, but relied upon a motion for judgment of acquittal at the close of the government's case?

7. Where the facts in evidence explain the proximity of stolen goods found in an automobile in which the petitioner is a passenger, does the presumption or inference, that the unexplained "possession" of recently stolen property will authorize conviction, apply?

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED.

Section 659 Title 18 U.S.C.A. (63 Stat. 91) in so far as pertinent to this case, provides:

> "Whoever embezzles, steals, or unlawfully takes, carries away, or conceals, or by fraud or deception obtains from any railroad car, wagon, motortruck, or other vehicle, or from any station, station house, platform or depot or from any steamboat, vessel, or wharf, or from any aircraft, air terminal, airport, aircraft terminal or air navigation facility with intent to convert to his own use any goods or chattels moving as or which are a part of or which constitute an interstate or foreign shipment of freight or express; or
>
> "Whoever buys or receives or has in his possession any such goods or chattels, knowing the same to have been embezzled or stolen; * *"

Section 3052, Title 18 U.S.C.A., 64 Stat. 1239, provides:

> Section 3052. POWERS OF FEDERAL BUREAU OF INVESTIGATION The Director, Associate Director, Assistant to the Director, Assistant Directors, inspectors, and agents of the Federal Bureau of Investigation of the Department of Justice may carry firearms, serve warrants and subpoenas issued under the authority of the United States and *make arrests without warrant for any offense against the United States* committed in their presence, or for any felony cognizable under the laws of the United States if *they have reasonable grounds to believe that the person to be arrested has committed or is committing such felony.* As amended Jan. 10, 1951, c. 1221, Section 1, 64 Stat. 1239. (Emphasis supplied)

The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable

searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

STATEMENT OF THE CASE.

A one-count indictment, 57 CR 355, was returned against the defendants, JOHN PATRICK HENRY and ALBERT RUDOLPH PIEROTTI, on May 21, 1957, charging them with the unlawful possession of three (3) cartons of radios of a value in excess of $100.00, which had theretofore been stolen from an interstate shipment, in violation of Section 659, Title 18, United States Code. The defendants each moved to suppress the evidence in this cause and after hearing by the Court, said motions were respectively denied on October 22, 1957. Subsequently, the motions to suppress were amended, and were again denied on November 25, 1957.

Defendants waived a jury and trial commenced on January 23, 1958; it was concluded on the same day. Both defendants moved for acquittal at the close of the government's evidence, and offered no evidence in their own behalf.

The defendants were convicted in the Court below, and were each sentenced to terms of one year and one day in the custody of the Attorney General.

EVIDENCE.

On May 13, 1957 the defendants JOHN PATRICK HENRY and ALBERT RUDOLPH PIEROTTI were arrested by George Stadtmiller and John Oitzinger, agents of the Federal Bureau of Investigation. The agents were in the vicinity

of 26th Street and Wallace Avenue, looking for leads to a "whiskey loss" of the Hayes Freight Line at 26th and Canal (R. 15-51). There was testimony that there were three or four FBI units in the area on the same assignment (R. 15-58). The agents first observed the defendants in a 1953 Ford automobile, driven by Mr. Pierotti (R. 12). The defendants were in an alley between Lowe St. and Union Avenue, and the alley ran from 26th to 28th Streets. The defendant Henry got out of the passenger side of the automobile, entered a gangway, and several minutes later, he returned to the automobile, carrying some cartons (R. 19). The agents were approximately 300 feet from the defendants. The defendants drove off in the automobile, and the agents lost track of them.

Several minutes later, the agents saw the automobile parked in the vicinity of the intersection of Wallace Avenue and 29th Street. The agents observed the two defendants leave the Red Top Lounge, reenter the automobile and return to the alley, where they had first observed them. Again, the defendant Henry left the automobile, went into a gangway, and returned carrying several cartons. The defendants again drove off. The agents, upon this occasion, were approximately 300 feet away (R. 20). When questioned as to the size of the cartons, or any identification or markings, Agent Oitzinger stated he could not even tell the size from that distance, and was unable to identify them as being the cartons identified as government's exhibits 1, 2 and 3, containing the radios, which were alleged to have been stolen. Agent Oitzinger further testified that he could not even tell whether the defendant Henry was carrying groceries in the cartons (R. 58). Stadtmiller could not tell whether they were full or empty, nor could he read any description (R. 25).

After the defendants drove away, the agents again temporarily lost sight of them, and shortly thereafter observed the defendants in the 1953 Ford, driving south in the 2600 block of Wallace Avenue. The FBI agents were proceeding north on the same street. The agents thereupon drove directly, in a head-on manner, at the defendants in their 1953 Ford, and Agent Stadtmiller motioned for the defendants to stop with his hand out of the FBI automobile window. Both cars stopped, and the agents motioned the defendants out of the automobile (R. 21).

A search of the vehicle was thereupon made, and the cartons containing the radios, the subject matter of the indictment herein, were discovered. Even then, they were not sure of an offense (R. 68). The agents established that the defendants' possession of the vehicle was lawful. In the trunk of the vehicle was a carton of cleaning material, which was subsequently shown not to have been stolen. The agents then took the defendants to the Chicago office of the FBI and, after several hours, determined that the radios had been taken from a motor truck of the Ziffrin Truck Lines. It was also established that the agents had called other truck lines to determine whether any truck line had suffered a radio loss (R. 16-17).

Thereafter, the defendants were *formally* placed under arrest—some time after 5 P. M. — or approximately three hours after they were first arrested on the street (R. 25, 63). Evidence was presented on the motion to suppress in which the defendants contended that there was no probable cause to make the arrest without warrant and incidental search. The trial court denied the motion.

At the trial of the case, the evidence adduced by the government may be summarized as follows:

A stipulation was entered into between the government and the defendants as to the interstate shipment; the value of the articles; that the articles were stolen on the date alleged in the indictment and from the place alleged in the indictment. The government also referred to the pleadings in which the defendants, by their motion to suppress, allege occupancy of the vehicle in which the articles were found, and by the amendment to the motion to suppress allege possession of the said articles (R. 35).

The following is a summary of the testimony of the witnesses:

Wilbur Holtz:

This witness stated that he saw JOHN PATRICK HENRY in Phil's Tavern at about 12 o'clock noon on May 13, 1957. The witness had been drinking since 7:30 in the morning, and asked the defendant Henry whether the defendant knew where the witness could bet on a horse. Henry said he wasn't sure, but might be able to find out, and asked permission to use the witness' 1953 Ford, in which both defendants were later apprehended. The witness gave Henry the keys and Henry took the vehicle. This witness denied the presence of any cartons of radios in his vehicle (R. 36-39).

Wallace Nunes:

This witness said he was a dock hand at Ziffrin Truck Lines, and on May 13, 1957 was working with the defendant, ALBERT RUDOLPH PIEROTTI, who was also employed at said truck line. In addition to the defendant Pierotti, the witness said one Joe Teodorczyk was working with them, unloading cartons of radios. The trailer was completely loaded and checked by noon. The defendant Pierotti asked

Nunes to punch his time card out at 2:30, even though Pierotti left the premises about 1:30. When Pierotti left the dock at 1:30, he was empty-handed (R. 39-45).

Joe Teodorczyk:

This witness testified that he was employed by the Ziffrin Truck Lines on May 13, 1957, and was working with Albert Rudolph Pierotti and Wallace Nunes in the loading of some cartons of radios on a Ziffrin trailer. This witness testified that he counted the cartons coming off of a Steffke trailer, from which the shipment was received, and on to the Ziffrin trailer across the dock. He stated that he counted them coming off of the Steffke trailer and all of them were placed on the Ziffrin trailer.

On cross examination, he stated that at least seven (7) persons had access to the Ziffrin trailer, which was loaded with additional material subsequent to the radio cartons being loaded (R. 45-51).

John Oitzinger:

This witness was an agent of the Federal Bureau of Investigation, who testified that he was assigned with Agent Stadtmiller to investigate the theft of whiskey from an interstate shipment of the Hayes Freight Line. He testified to the observation of the defendants, HENRY and PIEROTTI, as hereinbefore set forth. Apparently, Oitzinger conducted the questioning after the men were stopped, and Oitzinger determined at that time the ownership of the vehicle (R. 51-56). Oitzinger admitted that at least four or five cars, with one or two agents, were in the vicinity, looking for leads to the Hayes whiskey loss (R. 57). When he first saw the defendants, he could not tell what size carton Henry was carrying (R. 58). After Henry

and Pierotti were arrested, Oitzinger also stopped one Bedalow, who was driving a 1946 Ford sedan. Oitzinger said that this man was stopped merely because he was seen talking to Henry and Pierotti in front of the Red Top Lounge (R. 60). Oitzinger said that he had no warrant for the arrest of either Henry or Pierotti (R. 63).

Upon cross-examination, when asked whether the defendants were in violation of any law, so far as the agents knew, at the time the agents observed the defendants, the question was objected to and sustained by the Court (R. 63).

This witness also testified that a search of the vehicle in which the defendants were riding was made by Agent Stadtmiller (R. 67). After Agent Stadtmiller took the three cartons out of the defendants' automobile, the witness said to the defendants:

> "There is something wrong here, this isn't right. Let's go down to our office." (R. 68).

The government thereupon rested, after introducing the cartons of radios (R. 69).

The defendants offered no evidence, and moved for a judgment of acquittal. After argument, said motion was denied.

SUMMARY OF ARGUMENT.

I. That the arrest of the petitioner occurred at the moment when the federal agents stopped the motor vehicle on the public highway, and exercised restraint upon the individuals, and that subsequent questioning and the finding of stolen goods could not give validity to the original arrest, which was made without probable cause. An arrest without warrant is subject to interpretation in the light of the laws of the state where said arrest was made. Illinois law supports the position that the arrest occurred at the point where restraint was first exercised upon the motor vehicle and its occupants.

II. The petitioner was convicted solely upon the government's evidence of his presence as a passenger in an automobile which contained recently stolen goods, discovered after his arrest, and his fleeting twenty-minute association with the other defendant. The law does not require the defendant to extricate himself from a situation where the circumstances are as consistent with innocence as they are with guilt.

ARGUMENT.

I.

THE FOURTH AMENDMENT TO THE CONSTITUTION OF THE UNITED STATES DOES NOT PERMIT THE STOPPING OF AN INDIVIDUAL RIDING IN A MOTOR VEHICLE ON A PUBLIC HIGHWAY, DETENTION AND QUESTIONING OF SAID INDIVIDUAL, SEARCH OF THE VEHICLE IN WHICH HE IS RIDING AS A PASSENGER, PHYSICAL DEPRIVATION OF HIS FREEDOM OF MOVEMENT, WITHOUT SUCH CONDUCT CONSTITUTING ARREST. ANY FACTS DEVELOPED BY THE OFFICERS AFTER THE STOPPING OF THE MOTOR VEHICLE WILL NOT JUSTIFY OR GIVE VALIDITY TO THE ACT OF STOPPING.

The significance of the moment of arrest is bottomed on the principles of the Fourth Amendment to the Constitution of the United States, which define the rights of people to be secure in their persons, houses, papers and effects against unreasonable searches and seizures. This search and seizure was claimed to be incidental to arrest, and the principal questions here presented are 1) At what point did the arrest occur? and 2) Was the evidence discovered after the arrest? The time of arrest and therefore the validity of the evidence secured thereby is crucial because the motion to suppress such evidence, upon which the conviction is based, was denied below.

The evidence demonstrates that the agents of the Federal Bureau of Investigation drove headlong at the defendants' automobile, each car then traveling in an opposite direction, and motioned the petitioner and the driver of the automobile to stop and get out of the car. The petitioner stated, "Hold it! It's the G" (R. 23).

If the arrest occurred at that point, as the petitioner contends, then the subsequent finding of the radios, which were the subject of the indictment herein, could not make good the original arrest. The agents, in calling upon the defendants to stop their vehicle, did so by virtue of their official position. The evidence is such that the agents testified that the defendants knew they were federal officers (R. 54). The compulsion exercised by these officers then and there, in depriving the defendants of their freedom of proceeding along a public highway, constituted an arrest. These agents were armed men, ordering the defendants to stop, and they blocked the way of the defendants with their car. The petitioner contends that the restraint of his freedom of locomotion, thus inducing a reasonable apprehension that force would be used, unless there were submission, constitutes an arrest. It is enough to constitute an arrest, if the conduct of the officers operates on the will of the persons threatened, and results in a reasonable fear of personal difficulty or personal injury.

Therefore, if, as the petitioner contends, the arrest took place at the point of stopping, any subsequent look into the automobile, or questioning of the occupants, even if only a short time later, was an incident to the arrest. If probable cause did not exist prior to the finding of the cartons of radios, the subsequent finding cannot save the arrest. In connection with the problem here, the majority opinion of the Court of Appeals below stated in its opinion: (R. 86)

> "* * * the facts within the agents' knowledge amounted to more than mere suspicion and constituted probable cause for their action in stopping appellants' car.
>
> "The arrest and taking into custody of appellants followed the discovery of the cartons of radios bearing the shipping labels indicating that they were part of an interstate shipment and the far from satisfac-

> tory explanation by appellants in regard to the ownership of the cartons. * * * The agents on finding the cartons or radios in the car had reasonable ground to believe that the felony of illegal possession of goods stolen from an interstate shipment was then being committed and the arrest was therefore valid. * * *"

On the other hand, the dissenting opinion (R. 89) states:

> "Again we say there is no evidence of personal knowledge by the federal agents here that the defendants or either of them could have been suspected of interstate shipment thefts at the time the path of their car was intercepted by the agents and they were arrested and taken into custody. It was at that time probable cause had to exist for when their car was stopped by the agents intercepting its path and driving directly in front of them and making a head-on stop I think the arresting officers were then in the position of an officer who has entered a home; *i.e.*, the search at that time had to be valid and could not be saved by what it later uncovered.
>
> "In my opinion the search of defendants' automobile was in clear violation of the Fourth Amendment. I would, therefore, reverse and remand with instructions to sustain the motions to suppress."

Parenthetically, it should be noted at this point that the dissenting opinion makes the following observation pertinent to this portion of the brief: (R. 87)

> "Counsel for the Government stated in oral argument before this court that when the federal agents stopped the defendants' car the arrest of the defendants occurred right then and there. Thus it is clear that unless the agents had probable cause to *then* believe that the defendants had committed a felony cognizable under the laws of the United States that arrest was not a valid one and any search incident thereto was unlawful. The search at its commencement must be valid and cannot be saved by what it

> turns up. 'In law it is good or bad when it starts and does not change character from its success.' *U. S.* v. *Di Re*, 1948, 442 U.S. 581, 595."

It is therefore our position that the point of arrest is vital. The Court of Appeals below, in its majority opinion, has indicated one standard for stopping the automobile, and another standard for making the arrest. In other words, it appears that the agents may have had a suspicion that something was amiss, and thus, this suspicion could justify the stopping of the motor vehicle. Inherent in their opinion is the recognition that, by no stretch of the imagination, could the reasonably prudent agents have concluded that a federal offense was being committed. The Court of Appeals below, therefore, attempts to say in one paragraph of its opinion that the agents had probable cause to stop the vehicle. In the next paragraph, having stopped the vehicle, and having found that answers to their questions were not satisfactory, and having examined certain cartons, and having made a three-hour investigation as to the nature of the packages, which ultimately resulted in evidence that the packages had recently been stolen, the Court of Appeals has concluded that the agents had probable cause to make such an arrest. The opinion indicates that the initial arrest was made *after* the discovery of the cartons, and *after* the far from satisfactory explanation, and that the *formal arrest* occurred some three hours later in the offices of the Federal Bureau of Investigation. It is interesting to note that, even after the finding of the cartons of the radios in the automobile, Agent Oitzinger said (R. 68):

> "* * * I told them that 'there is something wrong here, this isn't right.' I said, 'Let's go down to our office.' "

It is the petitioner's further assertion that this Court, in *Giordenello* v. *United States*, 357 U.S. 480, 78 S. Ct.

1245, has recently reaffirmed the holding of *United States* v. *Di Re*, 332 U.S. 581, and *United States* v. *Rabinowitz*, 339 U.S. 56. For the Court of Appeals below to contend that the arrest can follow the actual restraint of the individual, who has been continuously in the custody of the Federal Bureau of Investigation from the point of the stopping of the automobile to the arraignment before the United States Commissioner on the following day, is in direct conflict with the above-cited cases.

The petitioner has quoted hereinabove portions of the majority opinion of the Court of Appeals below. It is further contended that said opinion is in conflict with leading cases in the State of Illinois on the subject of when an arrest occurs. In *People* v. *Mirbelle*, 236 Ill. App. 533, on the point involved herein, the decision of the Appellate Court is recognized and followed as authority in Illinois. The case holds:

> "In the instant case the People contend that 'defendant was not arrested until after officers viewed the concealed weapon on his person.' On the other hand, defendant strenuously contends that he was arrested when the officers, with drawn weapons, 'hollored' to him to 'stick them up, we are police officers, stick them up,' and he complied with that order.
>
> "'The word (arrest) is "derived from the French, arreter, to stop or stay, and signifies a restraint of a man's person; depriving him of his own will and liberty, and binding him to become obedient to the will of the law. It is called the beginning of imprisonment." *Legrand* v. *Bedinger*, 4 T.B. Mon. (Ky.) 539, 540.' (5 C.J. 385.)
>
> "'An arrest consists in taking, under real or assumed authority, custody of another person for the purpose of holding or detaining him to answer a criminal charge or civil demand. . . . The custody or control, the assumption of which is involved in an arrest,

imports actual restraint or detention, the mere utterance of words indicative of an arrest being insufficient, except perhaps when followed by submission. . . . An arrest is not consummated until there has been a taking of possession of the person by manual caption or otherwise, but the requisite control may be assumed without force, and in any manner by which the subject of the arrest is brought within the power or control of the person making it. Nor is manual touching necessary, where the subject of the arrest submits thereto or is otherwise actually subjected to restraint. But, where the person resists arrest, some manual touching of the body has been held necessary to consummate the arrest.' (5 C.J. 385-6.)

"'An arrest is the taking of a person into the custody of the law. It has also been judicially defined as the taking, seizing, or detaining the person of another; touching or putting hands upon him, in the execution of process, or any act indicating an intention to arrest. . . . An arrest, in the strict legal sense of the term, involves three elements: *authority, intention and a restraint of the person.* . . . There must be an intention, undersfood by the one arrested, to accomplish the arrest. . . . *A restriction of the right of locomotion is the most characteristic element of the arrest.* . . . An arrest is effected when the party is brought within the power of the officer, an actual manual touching not being essential.' (2 Am. & Eng. Ency. of Law [2d ed.] 834-6.)"

People v. *Mirbelle*, 276 Ill. App. 533, 540-541. (Emphasis supplied.)

In the case at bar, the arrest of the petitioner Henry occurred when his right to proceed along the public way was impeded. In this, we have the restriction of his right of locomotion. Next, he submitted to the authority of the arresting officers, and his acknowledgment of this is found in his words: "Hold it, it's the G." Lastly, the

intention of the armed agents of the Federal Bureau of Investigation, driving headlong at the automobile occupied by the petitioner, indicates an intention to arrest. We respectfully invite this Court's speculation as to what would have occurred, had the defendants attempted to flee. Did the petitioner and his companion, therefore, have to risk being shot, or seriously injured by ramming, in order to prove the point of arrest? *United States* v. *Di Re*, 332 U.S. 581.

It would appear from the facts involved in this case that the Federal Bureau of Investigation was conducting a dragnet operation in the neighborhood in which the defendants were arrested. The agents and others apparently stopped and searched individuals, other than the petitioner, with negative results. One Steve Bedlow was stopped by these agents, merely because he was seen talking to the defendants (R. 60). We can only speculate as to how many other people were subjected to this treatment.

The far-reaching effect of any stamp of approval by federal courts of this conduct will set a dangerous precedent for law-abiding citizens of this community. In Chicago, Illinois it is a well-known fact that the Police Commissioner has established what are known as "task forces", consisting of approximately one hundred and fifty local police officers, mounted on three-wheeled motorcycles. These "task forces" sweep into areas, and stop motorists on little or no pretext, with a view toward making searches and seizures of any and all articles found.

It seems apparent that the Federal Bureau of Investigation, upon notice that an amount of whiskey had been high-jacked, sent in a similar "task force" consisting of at least four units, to seek "leads" to said losses. These

agents were embarked upon a course of conduct, designed to ferret out some clue to the whereabouts of the whiskey stolen, or the culprits involved therewith. It is the petitioner's contention that, quite by chance, these articles were found in the automobile in which he was riding as a passenger, and that the facts and circumstances existing —prior to the stopping of the vehicle—could by no stretch of the imagination lead the agents to conclude that a "federal offense" had been, or was being, committed. Nor were there any reasonable grounds so to believe. Even the Court of Appeals below does not state that what occurred prior to the stopping of the vehicle constituted reasonable grounds to arrest for a "federal offense." Their only conclusion was that it might afford grounds for stopping the automobile.

The Court does say that the automobile travelled by a "rather indirect route" (R. 81). It seems quite clear on the record that the defendants, who were parked at 2903 South Wallace, in front of the Red Top Lounge, drove south to the end of that block which was 30th Street, turned to the right in a westerly direction to the next block, Lowe Street, and then proceeded north on Lowe Street to 28th Street and, again, west to an alley between Lowe Street and the following street, which was Union (R. 18, 19, 20, 53, 54). The only other way to proceed to the destination was to make a U-Turn from 2903 and head immediately north to 28th Street. So the only circumstance is that the defendants, in broad daylight (roughly two o'clock in the afternoon), were observed to go around the block, down two streets, and into an alley, and pick up cartons which could not be seen sufficiently to identify. In no instance was any disposition of the cartons observed.

Another leading case in the State of Illinois is *The People v. Scalisi*, 324 Ill. 131, which held that when a

police squad gave chase to a motor vehicle, the police squad was attempting to arrest the occupants. The Court held at p. 150:

> "When the police squad sought to infringe upon the liberty of plaintiffs in error and arrest and detain them for questioning they had no reasonable ground to suspect that either plaintiffs in error had been guilty of any crime, and plaintiffs in error were not nightwalkers or vagrants, and hence the attempt to arrest and detain them was unlawful. • • •"

It is respectfully submitted that the foregoing authorities have controlling weight, as it has long been settled that the law of the State, where an arrest without warrant for a federal offense takes place, determines its validity, in the absence of applicable federal statute. *United States* v. *Di Re*, 332 U.S. 581; *Johnson* v. *United States*, 333 U.S. 10, and *Coplon* v. *United States*, 191 F. 2d 749.

Many federal cases are to like effect: *United States* v. *Hanlon*, 50 F. 2d 465, which held that the stopping of an automobile and ordering its driver to pull up, constituted coercion, and the statement of the driver was given after the search and seizure had commenced. *United States* v. *Hamm*, 163 F. Supp. 4, holding that the search of an individual prior to a lawful arrest makes the search illegal, and the evidence obtained therefrom must be suppressed. *United States* v. *O'Connell*, 43 F. 2d 1005, held that, when suspicious circumstances prompted the agents to stop an automobile and subsequently liquor was found, such a search was unlawful. *Clay* v. *United States*, 239 F. 2d 196, is a case which holds that the mere act of a known gambler driving an automobile on the public highway will not justify an officer forcing him to stop to be searched or arrested for a suspected violation of the Federal Wagering Tax Act.

It is respectfully submitted that no probable cause existed here to justify the stopping, questioning, and detention of the petitioner. The subsequent finding of the radios cannot support the arrest. The motion to suppress below should have been sustained.

II.

THE EVIDENCE IS NOT OF SUFFICIENT WEIGHT, AS A MATTER OF LAW, TO SUPPORT THE CONVICTION OF THE PETITIONER, WHERE THE COURTS BELOW PRINCIPALLY RELIED UPON AN IMPROPER INTERPRETATION OF A SO-CALLED PRESUMPTION THAT UNEXPLAINED POSSESSION OF RECENTLY STOLEN GOODS WILL AUTHORIZE A CONVICTION.

The Court of Appeals below has sanctioned a departure from the accepted and usual course of judicial proceedings by a lower Court. The departure involves the affirmance of a conviction in which proof of a knowing and wilful violation must be established. It is the petitioner's contention that no such proof was made, but that both the District Court and the Court of Appeals below relied upon an improper interpretation of the presumption of unexplained possession of recently stolen goods. This presumption does not require an explanation from the petitioner, who did not take the stand in his own behalf. The explanation may be adduced from the facts presented by the government. The requirement that the petitioner must explain is erroneous. It is upon this requirement that the Courts below based the conviction.

The petitioner Henry makes the following observations with reference to the Court of Appeals' determination that as a matter of law, the evidence was sufficient to support a conviction as to him.

The Court of Appeals below, on this point in its opinion (R. 86), states as follows:

> "* * * However, in this case the record shows further that the car in which appellants were driving had been borrowed by Henry from one Wilbur Holtz who denied the presence of the cartons in his car at the time Henry took the vehicle. At the time they were stopped and questioned Pierotti untruthfully asserted that the car had been loaned to him. Agent Oitszinger testified of his observations of appellants' conduct set forth elsewhere in this opinion which shows clearly that Henry exercised dominion over the cartons completely inconsistent with the attempted explanation at the time of his arrest that the cartons were in the car when he got into it and that he did not know whom they belonged to. * * *"

The foregoing, then, is the basis upon which the Court of Appeals found sufficiency of the evidence.

Let us examine the Court of Appeals' statement a little more closely: First of all, "Pierotti untruthfully asserted that the car had been loaned to him." What effect can this statement of Pierotti's have possibly had upon the guilt of Henry, who, admittedly, had been drinking in various taverns since 7:30 that morning and who quite possibly was in no condition to drive. We respectfully submit that, under these circumstances, Henry had no obligation and maybe no ability to comment upon Pierotti's statement. This is not the case where a defendant, having been accused of something, and remaining mute, can be regarded as having admitted the truth of the accusation. By this statement, Pierotti cannot lift the connection between himself and Henry to the dignity of a conspiracy, thus binding Henry.

The opinion states that the petitioner Henry exercised dominion over the cartons. The record will disclose that

neither of the two agents upon being asked directly could in any way *identify the cartons*, Govt. Ex. 1, 2, and 3, containing the radios, as being the same cartons Henry was observed to have carried out of the gangway into the automobile. The Court of Appeals cannot supply that evidence.

Henry, on this record, said two significant things:

1. "Hold it, it's the G!" and

2. "Tell them you just picked me up."

Statement 1 indicates a submission to the authority of the Federal Bureau of Investigation. Statement 2 is an indication that Henry had only been with Pierotti a short time, and this is borne out by the record. The proof clearly shows that at the time Pierotti was handling the merchandise in question, the petitioner Henry was either engaged in partaking of alcoholic refreshment, or looking after his interest in the Sport of Kings.

The petitioner is not unaware of the fact that, in reviewing the guilt or innocence of the accused, the Court of Appeals must view the record in the light most favorable to the government. However, this never precludes the review of circumstantial evidence. It cannot be assumed that, when circumstantial evidence is relied upon by the government as proof of the guilt of a person, such evidence must be viewed only in favor of the government's case. The petitioner Henry relies on the great weight of authority that, in viewing circumstantial evidence, this sort of evidence must exclude every reasonable hypothesis, other than that of guilt. To this end, the petitioner Henry respectfully submits a reasonable hypothesis of innocence. That the District Court and the Court of Appeals disregarded this hypothesis, he now claims as error. In *Kassin*

v. *United States*, 87 F. 2d 183, 184, the Court stated that circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt and, where circumstantial evidence is relied upon, "* * * the links in the chain must be clearly proven, and taken together, must point not to the possibility or probability, but to the moral certainty of guilt." (P. 187.)

With this in mind, we invite this Court's attention to the circumstantial evidence which, we urge, clearly points to innocence. Without dispute, the following facts may be enumerated:

1. The petitioner Henry had been drinking in a tavern since 7:30 in the morning with the government's witness, Holtz.

2. At noon, Holtz asked the petitioner Henry if Henry knew where he could get a bet placed on a horse race.

3. The weather was bad, and Holtz loaned Henry the use of his automobile.

4. Pierotti was working on the dock of the Ziffrin Truck Lines and, by happenstance, handled the stolen radios sometime *in the forenoon*.

5. Pierotti left the dock at 1:30 P.M. and is next observed in the company of Henry at the Red Top Lounge at 2:10 P.M.

6. They are together in the automobile until about 2:40.

7. When arrested, Henry said two things:

"Hold it, it's the G," and "Tell them you just picked me up."

From the foregoing, the more reasonable hypothesis is that the petitioner Henry spent all of the forenoon at Phil's Tavern, drinking with one of the government's witnesses, Holtz. When Holtz indicated that he wanted to bet on a horse race, Henry left Phil's Tavern in Holtz's automobile to see if he could place the bet. Apparently, in his visits to various places, he met the co-defendant Pierotti at the Red Top Lounge.

Quite independently of Henry on these facts, Pierotti had managed to get his hands on the radios, which he had handled at his place of employment. These radios were loaded in the morning, before noon (R. 43), at the time when Henry was drinking with the government witness, Holtz.

It would appear from the facts that, upon meeting Henry at the Red Top Lounge, Pierotti asked if Henry had any transportation. Henry probably said, "Yes," and Pierotti asked if he could run a short errand. Pierotti drove and possibly, quite properly so, in view of the defendant Henry's all day drinking. There is absolutely no proof whatever—on the record or circumstantially—other than the fact that Henry was in the vehicle with the stolen property, that suggests his guilt.

His admission of a possessory interest in the stolen goods was made under circumstances which can only give rise to the conclusion that it was admitted for the sole purpose of asserting his constitutional rights under the Fourth Amendment. (See R. 31) *U.S. v. Chieppa*, 241 F.2d 635[1] may have no effect on the Court of Appeals for the 7th Circuit, in view of their consistent position that you must allege a possessory interest.

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[1] The Court of Appeals for the Second Circuit there held that the occupants of a motor vehicle had sufficient possessory interest in the contents of said vehicle to entitle them to move for the suppression of same as evidence.

In conclusion, it is the petitioner's observation that, other than association with Pierotti, the government is without sufficient proof. We are back, then, to what the Court of Appeals below said in its opinion: (R. 86)

> "* * * If, as appellant Henry contends, the government's case had been based solely on the fact of his presence in the car which contained the stolen goods and his association with the other defendant, the government would have failed to prove unlawful and knowing possession on his part. *United States* v. *O'Brien*, 7 Cir., 174 F.2d 341, 344 (1949). * * *"

It is for this alone—association that Henry stands convicted. We urge a ruling by this Court consistent with *United States* v. *O'Brien* (*supra*). *United States* v. *Caronella*, 198 F. 2d 3; *United States* v. *Wainer*, 170 F. 2d 603.

Moreover, if guilt be inferred from the evidence in this case, it must be inferred from circumstantial evidence. However, the circumstances must be such as to exclude every reasonable hypothesis, other than that of guilt. *Copeland* v. *United States*, 5 Cir., 90 F. 2d 78, 79 (1937); *Toubin* v. *United States*, 10 Cir., 93 F. 2d 861, 866 (1938); and where those circumstances are as consistent with innocence as with guilt, they have no probative value. *Tingle* v. *United States*, 8 Cir., 38 F. 2d 573, 575 (1930). Similarly, circumstances which merely raise suspicion or give room for conjecture are not sufficient evidence of guilt. *Kassin* v. *United States*, 5 Cir., 87 F. 2d 183, 184 (1937). In *Kassin*, the Court observed that where circumstantial evidence is relied upon, ". . . the links in the chain must be clearly proven, and taken together, must point not to the possibility or probability, but to the moral certainty of guilt." (P. 187.)